

CHAPTER 8

CIVILIAN PERSONNEL SUPPORTING MILITARY OPERATIONS

REFERENCES

1. DoDD 1404.10, Emergency-Essential (EE) DoD U.S. Citizen Civilian Employees, 10 April 1992.
2. DoDD 1400.31, DoD Civilian Work Force Contingency and Emergency Planning and Execution, 28 April 1995.
3. DoDI 1400.32, DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures, 24 April 1995.
4. AR 690-11, Mobilization Planning and Management, 14 September 1990.
5. DA Pam 690-47, DA Civilian Employee Deployment Guide, 1 November 1995.
6. DA Pam 715-16, Contractor Deployment Guide, 27 February 1998.
7. AFI 36-3026(I), Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel, 29 July 1999 (Joint Instruction Adopted by Order of the Secretaries of the Air Force, Army, Navy, Marine Corps, and Coast Guard.)
8. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261.

INTRODUCTION

Civilian employees have always accompanied the force during operations. Recently, Operations DESERT STORM and Joint Endeavor highlighted civilian employees' importance to the military mission. Civilian employees perform a number of jobs formerly held by soldiers, in areas as diverse as recreation specialists and intelligence analysts. Civilian employees' importance is reflected in the following Department of Defense Instruction:

It is DoD policy that the DoD civilian workforce shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies.” (DoDI 1400.32, para 4.)

An understanding of the process for designating, training, and directing the efforts of emergency-essential civilians (EE) while deployed is essential for judge advocates advising commanders while deployed.

DESIGNATING EMERGENCY ESSENTIAL POSITIONS

The first step in designating an EE position is to identify positions required to be performed in deployed environments, which a military member can not be expected to perform because the position requires uninterrupted performance. Civilian positions should be designated EE only when civilians are required for direct support to combat operations, or to combat systems support functions that must be continued, and that could not otherwise immediately be met by using deployed military possessing the skills in the number and in the functions expected to be needed to meet combat operations or systems support requirements in a crisis situation.

The specific crisis situation duties, responsibilities and physical requirements of each EE position must be identified and documented to ensure EE employees know what is expected. Documentation of EE duties in the existing peacetime position descriptions; a brief statement of crisis situation duties attached to position descriptions if materially different than peacetime duties; or separate EE position descriptions.

Advise applicants for EE positions that individuals selected to fill these positions are required to sign the DD Form 2365, “DoD Civilian Employee Overseas Emergency-Essential Position Agreement.” The agreement documents that incumbents of EE positions accept certain conditions of employment arising out of crisis situations wherein EE

employees shall be sent on temporary duty, relocate to duty stations in overseas areas, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not EE. All individuals selected for EE positions must be exempted from recall to the military Reserves or recall to active duty for retired military.

The EE position designation is included in the position description of each EE identified position. Example:

This position is emergency-essential (EE). In the event of a crisis situation, the incumbent or designated alternate, must continue to perform the EE duties until relieved by proper authority. The incumbent or the designated alternate may be required to take part in readiness exercises. This position cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the organization to function effectively; therefore, the position is designated “key,” which requires the incumbent, or designated alternate, to be screened from military recall status.

Incumbents of positions that become EE must sign DD Form 2365 as soon as reasonably practicable and consistent with the needs of the military mission. Employees who decline to sign the agreement should be detailed or reassigned to non-EE positions. If that is not possible, no tour extensions should be approved. If an employee declines to sign the agreement, but possesses special skills and expertise, which in management’s view renders it necessary to send that employee on the assignment without signing the agreement, the employee may be directed on involuntary temporary duty to the location where the employee’s skills are required. All civilian employees deploying to combat operations/crisis situations are considered EE regardless of volunteer status or the signing of the EE position agreement. The employee will be in an EE status for the duration of the assignment.

DEPLOYMENT PREPARATIONS

Identification. Issue EE employees, or employees occupying positions determined to be EE, the DD Form 489, “Geneva Convention Identity Card for Civilians Who Accompany the Armed Forces,” or DD Form 1934, “Geneva Convention Identity Card for Medical and Religious Personnel Who Serve In or Accompany the Armed Forces,” as appropriate. EE employees can be issued DD Form 2764, “*United States DoD/Uniformed Services Civilian Geneva Conventions Identification Card*.” The DD Form 2764 is an automated identification card available on the Real Time Automated Personnel Identification System (RAPIDS) and is not a manual form like the DD Form 469. If the RAPIDS system is not available, the DD Form 489 is a valid manual identification card for EE employees. EE employees shall also be issued passports, visas, country clearances, and any required security clearances.

Documentation. Civilian employees fill out DD Form 93, “Record of Emergency Data.” Components will establish procedures for storing, and accessing civilian DD 93s, and for civilian casualty notification and assistance that are the same as or parallel to those for military personnel.

Clothing and Equipment Issue. Organization Clothing and Individual Equipment (OCIE) will be issued to EE and other civilians who may be deployed, and will be worn in a tactical environment in accordance with supported unit procedures. Maintenance and accountability of OCIE is the employee’s responsibility. Personal clothing and care items are the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

Training Requirements. Civilian EE employees shall be provided with the same specialized training as military members on a periodic basis and prior to any deployment, including the use of protective gear. Training on their responsibilities as members of the force, e.g. standards of conduct, cultural awareness training, as well as coping skills if they become Prisoners Of War, Law of War training, and training in the Uniform Code of Military Justice should also be provided.

Medical and Dental Care. Prior to deployment, provisions shall be made for EE employee medical care in the theater of operations. As part of pre-deployment preparations, EE employees shall receive the same immunizations as military personnel in theater. EE employees may be ordered to submit to required immunizations for service in the theater, and may be subjected to discipline for failing to submit. EE employees shall be tested for HIV before deployment, if the country of deployment requires it. DA policy (DA DCSPER/ OTJAG decision) is that when a requirement exists for mandatory HIV screening, and the test is positive, the individual can be deployed in support of a contingency operation if the host country is notified and the EE employee is able to perform assigned duties. EE employees shall receive medical

and dental examinations and, if warranted, psychological evaluations to ensure fitness for duty in the theater. Civilians shall carry with them a minimum of a 90-day supply of any medication they require.

During a contingency, returning EE civilians shall receive cost-free military physical examinations within 30 days if the medical community decides it is warranted, or required for military personnel.

Casualty, Mortuary, and Family Care. All EE civilians who PCS or are TDY outside the United States shall have panarex or DNA samples taken for identification purposes. Dental x-rays may be substituted when the ability to take panarex or DNA samples is not available. Civilians may also be issued “dog tags” for identification purposes.

EE civilians with dependents who are in or deploying to a theater of operations are encouraged to make Family Care Plans. As a condition of employment, single parents or families where both parents are emergency-essential civilians, are required to prepare a family care plan which is equivalent to that required of military (AR 690-11).

Graves Registration personnel shall process civilians killed in a theater of operations. An escort officer is authorized, and a flag shall be purchased for the casket at Government expense.

Legal Assistance. Legal assistance, including wills and any necessary powers of attorney relating to deployments, is available to EE notified of deployment, as well as their families, and will be available throughout the deployment. It is limited to deployment related matters as determined by the on-site supervising attorney.

Weapons Certification and Training. Under certain conditions, and subject to training IAW FM 23-35 in proper use and safe handling of firearms, EE employees may be issued personal self-defense sidearms. Acceptance of a sidearm is voluntary. Authority to carry sidearms is contingent upon the approval and guidance of the supported Combatant/MACOM Commander. Only government issued sidearms/ammunition are authorized.

COMMAND AND CONTROL DURING DEPLOYMENTS.

During deployments, EE are under the direct command and control of the on-site supervisory chain who will perform the normal supervisory functions, such as performance evaluations, task assignments and instructions, and initiating and effecting recognition and disciplinary actions.

On-site commanders may impose special rules, policies, directives, and orders based on mission necessity, safety, and unit cohesion. **These restrictions need only be considered reasonable** to be enforceable.

COMMON ISSUES DURING DEPLOYMENTS.

Tour of Duty. The Administrative workweek constitutes the regularly scheduled hours for which an EE civilian must receive basic and premium pay. Under some conditions, hours worked beyond the administrative workweek may be considered to be irregular and occasional, and compensatory time may be authorized in lieu of overtime/premium pay. The in-theater commander or his representative has the authority for establishing and changing EE tours of duty. The in-theater commander will establish the duration of the change.

Overtime. EE civilians whose basic rates of pay do not exceed that of a GS-10, step 1, will be paid at a rate of one and one-half times their basic hourly pay rate for each hour of work authorized and approved over the normal 8 hour day or 40 hour week. Employees whose rate exceeds that of a GS-10, Step 1, will be paid at the rate of one and one-half times the basic hourly rate of a GS-10, Step 1. If overtime is not approved in advance, the EE employee’s travel orders should have this statement in the remarks column: “Overtime authorized at TDY site as required by the Field Commander. Time and attendance reports should be sent to (name and address).” Field commanders should then submit to the EE employee’s home installation a DA Form 5172-R, or local authorization form (with a copy of the travel orders), documenting the actual premium hours worked by each EE employee for each day of the pay period as soon as possible after the premium hours are worked.

On Call Employees. Emergencies or administrative requirements that might occur outside the established work hours may make it necessary to have employees “on-call.” On-site commanders may designate employees to be available for

such a call during off-duty times. Designation will follow these guidelines: 1) A definite possibility that the designated employee's services might be required; 2) On-call duties required will be brought to the attention of all employees concerned; 3) If more than one employee could be used for on-call service, the designation should be made on a rotating basis; 4) The designation of employees to be "on-call" or in an "alert" posture will not, in itself, serve as a basis for additional compensation (i.e., overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours.

Leave Accumulation. Any annual leave in excess of the maximum permissible carry-over is automatically forfeited at the end of the leave year. Annual leave forfeited during a combat or crisis situation, which has been determined by appropriate authority to constitute an exigency of the public business, may be temporarily restored. However, the employee must file for carry-over. Normally, the employee has up to two years to use restored annual leave.

Foreign Post Differential. Employees assigned to work in foreign areas where the environmental conditions either differ substantially from CONUS conditions or warrant added compensation as a recruiting and retention incentive are eligible for Foreign Post Differential (FPD) after being stationed in the area in excess of 41 days. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate not to exceed 25% of the basic pay. The Department of State determines areas entitled to receive FPD, the FPD rate for the area, and the length of time the rate is in effect. Different areas in the same country can have different rates.

Pay and allowances during deployments. Civilian employees receive the same pay and allowances to which they were entitled prior to deploying, and to which they would become entitled thereafter (i.e., within grade increases). There is no tax exclusion for civilian employees similar to the combat tax exclusion for military members.

Danger Pay. Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State because of civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well being of a majority of employees stationed or detailed to that area, will receive a danger pay allowance (DPA). The allowance will be a percentage of the employee's basic compensation at the rates of 15, 20, or 25 percent as determined by the Secretary of State. This allowance is in addition to any foreign post differential prescribed for the area but in lieu of any special incentive differential authorized the post prior to its designation as a danger pay area. The DPA commences for employees already in the area on the date of the area's designation for danger pay. For employees later assigned or detailed to the area, DPA commences upon arrival in the area. For employees returning to the post after a temporary absence it commences on the date of return. DPA will terminate with the close of business on the date the Secretary of State removes the danger pay designation for the area or on the day the employee leaves the post for any reason for an area not designated for the DPA. The DPA paid to Federal civilian employees should not be confused with the Imminent Danger Pay (IDP) paid to the military. The IDP is triggered by different circumstances and is not controlled by the Secretary of State.

Life Insurance. Federal civilian employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death. Civilians who are deployed with the military to combat support roles during times of crises are not "in actual combat" and are entitled to accidental death and dismemberment benefits under FEGLI in the event of death. Similarly, civilians carrying sidearms for personal protection are not "in actual combat."

CONTRACTOR EMPLOYEES

"In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence, covering, clothing, and moving of any Army." Robert Morris, Superintendent of Finance, 1781.

Contractor employees have also served with the force during contingency operations. Although the United States Government has a similar relationship towards its contractor employees as it does towards its civilian employees; there are significant differences which must be resolved by referring to specific contractual language which defines the relationship of the contractor employee to the United States.

Command and Control. The command and control of contractor employees is significantly different than that of EE employees. For contractor employees, command and control is tied to the terms and conditions of the government contract. Contractor employees are not under the direct supervision of military personnel in the chain of command. The Contracting Officer (KO) or the Contracting Officer's Representative (KOR) is the designated liaison for implementing contractor performance requirements. While the government does not directly command and control contractor employees, key performance requirements should be reflected in the contract. For example, theater commander directives, orders and essential standard operating procedures can be incorporated into the government contract. If those requirements should change, to satisfy the commander's new requirements the contracting officer can modify the contract. Contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander. All instructions and guidance will be issued based upon the need to ensure mission accomplishment, personal safety, and unit cohesion. If the instructions and orders of the Theater Commander are violated, the Theater Commander may limit access to facilities and/or revoke any special status that a contractor employee has as an individual accompanying the force. The KO or KOR may also direct that the contractor remove from the theater of operations any contractor employee whose conduct endangers persons or property or whose continued employment is inconsistent with the interest of military security.

Legal Assistance. Contractor employees in the U.S. preparing to deploy abroad, or already deployed overseas, to perform work pursuant to any contract or subcontract, generally will not be eligible to receive legal assistance from military or civilian attorneys, and should satisfy all legal requirements they deem necessary, such as a last will and testament, guardianship arrangements for children and estate planning, with privately retained attorneys before deployment.

Exceptions: If contractor employees are accompanying the Forces outside the United States, they may receive certain legal assistance from attorneys when DA or DoD is contractually obligated to provide this assistance as part of their logistical support. The specific terms of the contract under which contractor employees are deploying must be reviewed to verify if DA is obligated to provide legal service. Where DA is under a contractual obligation to provide legal assistance, the following rules apply: 1) If the legal assistance is to be provided overseas, it must be in accordance with applicable international agreements or approved by the host nation government. 2) Legal assistance, is limited to ministerial service (for example notarial services), legal counseling (to include the review and discussion of legal correspondence and documents), and legal document preparation (limited to powers of attorney and advanced medical directives) and help on retaining civilian attorneys. Note that contract employee status is irrelevant if the person is an authorized recipient of legal assistance services, e.g. Retiree or family member otherwise authorized legal assistance services.

Identification Cards. Contractor employees will receive the following three distinct forms of identification: DD Form 1173 (Uniformed Services Identification and Privilege Card). This card is required for access to facilities and use of privileges afforded to military, government civilians and/or military dependents. DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). This card identifies one's status as a contractor employee accompanying the U.S. Armed Forces. This card must be carried at all times. Personal identification tags that include the following information: full name, social security number, blood type and religious preference. These tags should be worn at all times. In addition, other identification cards, badges, etc., may be issued depending upon the basis for the operation. For example, when U.S. forces participate in United Nations (UN) or multinational peace-keeping operations, contractor employees may be required to carry identification that verifies their relationship to the UN or multinational force. If their employer processes contractor employees for deployment, it is the employer's responsibility to ensure its employees receive required identification.

Organizational Clothing and Equipment Issue. Personal clothing and personal care items, to include both casual attire and work clothing required by the assignment, are the responsibility of the individual contractor employee and will not be issued at the processing center. If required by the Theater Commander, the deployment processing center will issue Organizational Clothing and Individual Equipment (OCIE) to contractor personnel. The wearing of such equipment by contractor personnel, however, is voluntary, unless required in the contractual agreement.

Force Protection. The government will provide force protection for those contractor personnel accompanying forward-deployed forces.

Weapons and Training. Individual Deployment Sites (IDS) or CONUS Replacement Centers (CRC) may issue sidearms to contractor employees for their personal self-defense. The issuance of such weapons must be authorized by the Theater Commander and must comply with military regulations regarding firearms training and safe handling. Weapons familiarization is provided to contractor employees as part of the IDS/CRC deployment processing. The acceptance of self-defense weapons by a contractor employee is voluntary and should be in accordance with the gaining theater and the contractor's company policy regarding possession and/or use of weapons. **Authorization for the use of privately owned weapons may be required through the U.S. Embassy channels vice military chain of command. Weapons safety and training may be also implemented by embassy Regional Security Officers (RSOs).**

CONTRACTOR ISSUES DURING DEPLOYMENTS

Vehicle and Equipment Operation. Deployed contractor employees may be required to operate U.S. military, government owned or leased equipment such as generators and vehicles. Contractor personnel may also be required to obtain a local license for the country they are being deployed to, i.e. German driver's license. While operating a military owned or leased vehicle, a contractor employee is subject to the local laws and regulations of the country, area, city, and/or camp in which he/she is deployed. Traffic accidents or violations usually will be handled in accordance with the local laws, the Status of Forces Agreement, and/or Theater Commander guidance. If a contractor employee does not enjoy special status under the Status of Forces Agreement, then he/she may be subject to criminal and/or civil liabilities. Therefore, the employee or contractor may be held liable for damages resulting from negligent or unsafe operation of government military vehicles and equipment.

Living under field conditions. Generally, a contractor employee's living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract specifically mandates or prohibits certain living conditions.

Medical and Dental care. Military and/or host nation emergency medical and dental care will be available to contractors should the need arise, at a level commensurate with that afforded government employees and military personnel. Deployed contractor personnel generally do not receive routine medical and dental care at military medical treatment facilities unless specifically included in the contract. In the absence of such agreements, contractors should make provisions for their employees' medical and dental care.

MWR Support. Contractor employees may be eligible to use some or all MWR facilities and activities subject to the installation or Theater Commander's discretion and the terms of the contract. U.S. citizen contractor employees may be eligible for use of Army and Air Force Exchange Service (AAFES) facilities for health and comfort items. Use of these facilities will be based on the installation or Theater Commander's discretion, the terms of the contract with the government, and the terms of the applicable Status of Forces Agreement.

Status of Forces Agreements (SOFAs). Contractor employee's status will depend upon the specific provisions of the SOFA, if any, that are applicable between the U.S. and the country of deployment at the time of deployment. Contractor employees may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying. The North Atlantic Treaty Organization (NATO) SOFA is generally accepted as the model for bilateral and multilateral SOFAs between the U.S. Government and host nations around the world. The NATO SOFA covers three general classes of sending state personnel: Members of the "force," i.e., members of the armed forces of the sending state; Members of the "civilian component," i.e., civilian employees of the sending state; "Dependents," i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support. **Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the civilian component.** Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

Discipline of Contractor Employees. Contractor personnel may have administrative privileges (i.e., suspension of exchange or MWR privileges, etc.) suspended for disciplinary infractions. Such conduct includes making any sale, exchange, transfer, or other disposition of exchange merchandise or services to unauthorized persons, whether or not for a profit; using exchange merchandise or services in the conduct of any activity for the production of an income; theft of exchange merchandise or other assets by shoplifting; and intentional or repeated presentation of dishonored checks or other indebtedness. The process for removal of contractor employees from the theater of operations is dependent upon the policies issued by the Theater Commander, and the extent to which those policies are incorporated in the terms of the contract and are exercised through the contracting officer.

Tours of Duty and “On-Call” Requirements. A contractor employee’s Tour of Duty is established by the employer and the terms and conditions of the contract between the employer and the government. On-call requirements, if any, will be included as special terms and conditions of an employer’s contract with the Government.

CRIMINAL JURISDICTIONAL ISSUES

On 22 November 2000, the President signed the *Military Extraterritorial Jurisdiction Act of 2000*, 18 U.S.C. §3261. This legislation provides federal criminal jurisdiction over DoD civilian employees, dependents and contractors accompanying the force overseas. Crimes punishable by over a year are covered by the legislation. The implementing guidance is forthcoming.

The *Military Extraterritorial Jurisdiction Act of 2000* fills a large jurisdictional gap overseas but it does not replace existing Status of Forces Agreements (SOFA). Deployed Judge Advocates must still look to the SOFA for controlling guidance on jurisdiction.